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Mechanic's Liens -- Notice of Pendency Necessary to Enforce Lien

John B. Cummings

This cogent argument was dismissed simply as "novel and difficult." It is the duty of the officers to register the Party. If an officer must claim the privilege in his own behalf, either on the registration statement itself or on a separate form, he would thereby be forced to do more than merely arouse suspicion, but would actually admit an element of a crime, namely, his connection with the Party.[29]

If the officers choose not to file a registration statement nor to claim the privilege for themselves, their only alternative is to default in complying with the Board's order. Default means the risk of criminal prosecution, possibly at the phenomenal degree of ten thousand dollars a day plus five years in prison for each day of that default. No person should be forced to violate the law or to risk self incrimination before his constitutional claims can be adjudicated.

TAYLOR MATTIS

MECHANIC'S LIENS — NOTICE OF PENDENCY NECESSARY TO ENFORCE LIEN

In an action to foreclose a mechanic's lien, the defendant moved to dismiss and to discharge the property for failure of the plaintiff to file a notice of pendency within a year according to the provisions of the Florida Mechanics' Lien Law.[1] The defendant had actual notice of the suit from its inception, and the suit was instituted less than one year from the filing of the claim of lien. The motion was denied. *Held*, reversed: a lien is discharged for failure of the claimant to file a notice of pendency within one year after the filing of the claim of lien as required by the unambiguous terms of the statute. *Trushin v. Brown*, 132 So.2d 357 (Fla. App. 1961).

Mechanic's lien laws, although they confer a right in derogation of the common law, are construed liberally in order to benefit the lien claimants.[2]

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be the basis of future prosecution for offenses to which Communist activities relate. The immunity grant in the Subversive Activities Control Act is almost identical with that found insufficient in Counselman v. Hitchcock, 142 U.S. 547 (1892). The statute involved there was struck down with the ruling that an immunity provision, to be effective in such cases, must bar any subsequent criminal prosecution upon any information acquired directly or indirectly from the use of the declarant's statement.

29. This rationale was used by Justice Brennan in dissent. Chief Justice Warren concurred with him. Communist Party of United States v. Subversive Activities Control Bd., 81 Sup. Ct. 1357, 1458 (1961). See also Note, 51 COLUM. L. REV. 606, 619 (1951).

1. FLA. STAT. § 84.21 (1961): "No lien provided by this chapter shall continue for a longer period than one year after the claim of lien has been filed unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction and *a notice of the pendency of such action is filed with the clerk of the circuit court of the county in which the claim of lien is filed* . . . ." (Emphasis added.)

2. Gallagher v. Campodonico, 121 Cal. App. 765, 5 P.2d 486 (Super. Ct. 1931); United States v. Griffin-Moore Lumber Co., 62 So.2d 589 (Fla. 1953); Hendry Lumber Co.

But the mandatory requirements to perfect the lien are strictly construed,[3] and there must be a "substantial" compliance.[4] Therefore, the existence of the lien[5] and the jurisdiction of the court[6] depend on the statute and not on rules of equity. Time provisions regarding the commencement of the suit are strictly construed by the courts. The time limitations are regarded as a limitation of right as well as remedy. Thus, the lien is lost if the commencement of the suit fails to comply with the designated time provisions.[7]

Mechanic's lien notice of pendency is a statutory requisite aimed at avoiding the sometimes severe consequences of the common law *lis pendens*.[8] Those states providing for it in their statutes attempt to protect a bona fide purchaser by requiring the claimant to file a notice of pendency so as to place third parties on notice.[9]

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v. Bryant, 138 Fla. 485, 189 So. 710 (1939); Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N.W.2d 298 (1943).

3. City of St. Augustine v. Brooks, 55 So.2d 96 (Fla. 1951); Charles A. Hohmeier Lumber Co. v. Knight, 350 Ill. 248, 182 N.E. 715 (1932); H. N. Francis & Co. v. Hotel Rueger, 125 Va. 106, 99 S.E. 690 (1919).

4. Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577 (1930) held that it was necessary for a materialman to institute a separate suit within the statutory time although said claimant was named in a foreclosure suit by a previous lienor. The lien was discharged in Cox v. Hruza, 54 N.J. Super. 54, 148 A.2d 193 (App. Div. 1959) because the materialman failed to endorse the commencement of the suit on the lien claim as required by statute. C.C. Constance & Sons v. Lay, 122 Ohio St. 468, 172 N.E. 283 (1930) held that the lien was discharged because a deficient affidavit failed to state an amount above all legal set-offs.

5. Eddins v. Tweddle, 35 Fla. 107, 17 So. 66 (1895).

6. Pearce v. Knapp, 71 Misc. 324, 127 N.Y. Supp. 1100 (Otsego County Ct. 1911); C.C. Constance & Sons v. Lay, 122 Ohio St. 468, 172 N.E. 283 (1930).

7. Bowery v. Babbit, 99 Fla. 1151, 128 So. 801 (1930). See also Annot., 139 A.L.R. 903 (1942).

8. The common law *lis pendens* gives constructive notice to third parties upon the institution of suit by the lien claimant. The bona fide purchaser then takes no better title than the grantor had. The statutory *lis pendens*, or notice of pendency, attempts to alleviate this situation through statutory provision. If separate notice is not filed according to statute regarding the institution of the lien suit, the innocent buyer is not affected by the outcome. Batson v. Etheridge, 239 Ala. 535, 540, 195 So. 873, 877 (Ala. 1940): "The purpose of the lis pendens record is to afford purchasers of land pending suit an opportunity to have a better method of protecting themselves against the common law doctrine of lis pendens; so that, if such notice is not filed as authorized, a purchaser from a party to such a suit is not affected by the result of that suit, unless he has actual notice of it."

It should be noted that "statutory *lis pendens*," "*lis pendens* record" and "notice of record" are terms used interchangeably by the courts to mean "notice of pendency" as distinguished from the common law "*lis pendens*."

9. Laverents v. Craig, 74 Colo. 297, 299, 225 Pac. 250, 251 (1923): "The provision . . . for the filing of the statutory notice of *lis pendens* does not fall within the condition imposed as to the time of bringing the action. It is a requirement by itself, and is an independent clause, aiming, obviously, at the protection of third parties who might deal with the property in ignorance of the contractor's claim."; Continental Sec. Corp. v. Wetherbee, 187 La. 773, 175 So. 571 (1937); McWhorter v. Brady, 41 Okla. 383, 387, 140 Pac. 782, 784 (1913): "The doctrine of *lis pendens* under the common law, was based on the theory of public policy, while, under our statute, it appears to be treated as an element of the law of notice." *Id.* at 388, 140 Pac. at 785: "[T]he statutory rule governing *lis pendens* is broader and more comprehensive than the common-law rule, in that the statutory

The Florida court faced a unique issue in *Trushin v. Brown* in that the owner raised as a defense the lienor's failure to file notice of pendency. There were no third parties involved, and obviously the defendant had actual knowledge of the claim since the inception of the suit.[10] Courts differ as to whether notice of pendency is a prerequisite to the lien when applied to this factual situation. Lien statutes similar to Florida's[11] do not mention the purpose for notice of pendency, yet they *clearly* demand compliance with the requirements. As a result, some courts have held that the existence of the lien[12] depends on the unambiguous, mandatory requirement[13] of filing a notice of pendency. *Lansdell Co. v. Morrison*[14] held that the lien lapsed due to the claimant's failure to file a notice of pendency according to the time provision clearly stated in the statute. *Johnson v. Waldo Griffiths, Inc.*[15] decided that the notice of pendency requisite was a jurisdictional requirement which could not be supplied *nunc pro tunc*.

Other jurisdictions have ignored the unequivocal statutory demands of notice of pendency as between parties to the suit and have looked to the

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lis pendens partaking, as it does, of the nature and doctrine of notice, makes notice the channel or means through, or by which, the real object and purpose of *lis pendens* is attained."; Dice v. Bender, 383 Pa. 94, 117 A.2d 725 (1955). The dissent's contention in *Trushin* is that "a 'notice of pendency' is a 'lis pendens' by English translation and is the same creature in a different coat. As such it has no office here where the defendant had knowledge of pendency at all times." Trushin v. Brown, 132 So.2d 357, 359 (Fla. App. 1961). This contention appears valid.

10. Trushin v. Brown, 132 So.2d 357, 359 (Fla. App. 1961).

11. Mechanic's lien statutes vary throughout the states in construction and content. But notice of pendency clauses, when provided, bear a marked similarity. Cases cited in this paper were decided in accordance with either the following state statutes or similar notice of pendency clauses. Cal. Stats. 1953, ch. 1402, § 1, at 2996: "No lien provided for in this chapter binds any property for a longer period than 90 days . . . unless within that time, proceedings to enforce the same be commenced in a proper court and a notice of pendency of such proceedings be filed as provided in Section 409." CAL. CODE CIV. PROC. § 409 (Deering 1961): "From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action as it relates to the real property and only of its pendency against parties designated by their real names." COLO. REV. STAT. ch. 86-3-10 (1953): "No lien [shall be] claimed by virtue of this article, as against the owner of the property . . . unless . . . a notice stating that such action has been commenced shall have been filed for record . . . in the office of the clerk and recorder of the county in which said property is situate." MICH. PUB. ACTS § 570.10 (1948): "Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens filed for record in the office of the register of deeds . . . . " N. Y. LIEN LAW § 17: "No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of pendency of such action . . . is filed with the county clerk of the county in which the notice of lien is filed . . . . "

12. Joyce Lumber Co. v. Wick, 200 Iowa 796, 205 N.W. 476 (1925); Matter of Rudiger, 118 App. Div. 86, 102 N.Y. Supp. 1053 (1907); Siracusa v. Inch Corp., 164 Misc. 820, 298 N.Y. Supp. 878 (New York City Ct. 1937); Coleman v. Pearman, 159 Va. 72, 165 S.E. 371 (1932).

13. R. M. Hacker Co. v. Hollymount Bowl, 146 Cal. App. 2d 875, 303 P.2d 387 (1956); Cox v. Hruza, 54 N.J. Super. 54, 148 A.2d 193 (App. Div. 1959).

14. 89 N.Y.S.2d 870 (Sup. Ct. 1949).

15. 144 Misc. 773, 259 N.Y. Supp. 386 (Sup. Ct. 1932). But New York decisions are not harmonious. Sheffield v. Robinson, 73 Hun 173, 175, 25 N.Y. Supp. 1098, 1099 (Sup. Ct. 1893): "The object of a [statutory] *lis pendens* is to give notice of the pendency

purpose of the provision. Notice of pendency does not create the lien, and the jurisdiction of the court is not dependent upon it.[16] Property owners primarily liable cannot defend themselves because of the lienor's failure to file the notice when third parties are not involved.[17] *J. W. Copeland Yards v. Sheridan*[18] held that the plaintiff's failure to file notice did not forfeit his rights, since the owner affected was not an innocent purchaser or a third party. In *Vender Horst v. Kalamazoo Apartments Corp.*,[19] one lienor intervened in a suit against the owner of the property. This claimant had not filed a notice of pendency and had not been named by any of the original lien claimants through their notices. Yet, the Michigan Supreme Court determined that there had been actual notice of this lien to the property owner and held there was no need for the notice of pendency demanded by the statute.

Although the outcome in the instant case is a harsh one, the court is justified in its conclusion. The problem involves a balancing of strict legal construction against the purpose of the statutory *lis pendens*, and either choice can be supported by past decisions. Notice of pendency, in addition to timely commencement of suit, is now a prerequisite to the existence of the lien.[20] Yet, it seems unfortunate that Florida must await a

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of the action to persons who may subsequently acquire rights in the property, but it is not required for the protection of the parties to the action, for they have notice of its pendency and of the claim made by it." See Schechter v. Rosen, 8 Misc. 2d 635, 168 N.Y.S.2d 825 (Sup. Ct. 1957). The language of the court in *Schechter* shows the purpose of the notice of pendency and points out in dicta that it does not create the lien.

16. Patten-Blinn Lumber Co. v. Francis, 166 Cal. App. 2d 196, 333 P.2d 255 (1958). But notice the conflict with R.M. Hacker Co. v. Hollymount Bowl, 146 Cal. App. 2d 875, 303 P.2d 387 (1956). In the *Patten* case, the court dealt with § 409 [see note 11 *supra*] and interpreted it as dealing with a potential bona-fide purchaser, thereby avoiding the strict requisite of § 1198.1 [quoted in note 11 *supra* as Cal. Stats. 1953, ch. 1402, § 1, at 2996]. But in the *Hacker* case, the court stated: "Section 409 is a general section applicable to all classes of actions affecting the title or right of possession of real property and is permissive merely; it in no way affects the maintenance of such actions. Section 1198.1, on the other hand, is not only a special statute dealing with actions for foreclosure of mechanic's liens, but mandatory in its terms and prescribing a condition to the maintenance thereof. Section 1198.1 is therefore controlling . . . ." *Id.* at 877, 303 P.2d at 388. See also Sandberg v. Victor Gold & Silver Mining Co., 24 Utah 1, 66 Pac. 360 (1901).

17. Laverents v. Craig, 74 Colo. 1297, 225 Pac. 250 (1923); Jurgens v. Sheridan, 136 Ore. 45, 296 Pac. 840 (1931).

18. 136 Ore. 37, 296 Pac. 838 (1931).

19. 239 Mich. 593, 215 N.W. 57 (1927). See also Hart v. Reid, 243 Mich. 175, 219 N.W. 692 (1928); Whitehead & Kales Co. v. Taan, 233 Mich. 597, 208 N.W. 148 (1926).

20. Florida courts seem committed to the idea that statutory *lis pendens* also refers to the jurisdiction, control, and power which the courts have over the subject matter of the suit. Intermediary Fin. Corp. v. McKay, 93 Fla. 101, 111 So. 531 (1927); De Pass v. Chitty, 90 Fla. 77, 105 So. 148 (1925). *But see*, Blackburn v. Bucksport & Elk River R.R., 7 Cal. App. 649, 653, 95 Pac. 668, 670 (1908): "[I]t is unimportant whether a *lis pendens* was or was not recorded, so far as this appellant is concerned. *He voluntarily submitted himself to the jurisdiction of the court in the case*, and we do not think, as we have already indicated, that the mere omission to file for record the notice of the pendency of the action affects the question of the court's jurisdiction of the subject matter of the litigation. In other words, we do not think . . . the filing of the notice of the pendency

legislative measure to prevent this outcome each time the issue appears in the courts.[21] The notice of pendency requirement, as between parties to the suit, should be regarded as directory.

JOHN B. CUMMINGS

REAL PROPERTY — IS A CONTRACT FOR THE SALE OF LAND A MORTGAGE?

The plaintiffs purchased a house and paid for it with money which they borrowed from the defendant-appellant. "As a part of this loan transaction, the plaintiffs apparently assigned to the defendant their deed to the land and took back an unrecorded contract for deed . . ."[1] which provided for forfeiture and repossession in the event of default. Upon default the defendant repossessed the plaintiffs' house. In the plaintiffs' action for trespass,[2] *held*: the contract was a mortgage, subject to the same rules of foreclosure as are prescribed in relation to mortgages, and upon default of the contract, the lender had no right to repossess. *Mid-State Inv. Corp. v. O'Steen*, 133 So.2d 455 (Fla. App. 1961), *cert. denied*, 136 So.2d 349 (Fla. 1962).

The Florida mortgage statute[3] is comprehensive in its scope and should be liberally construed.[4] It defines a number of instruments not formally

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. . . is an essential prerequisite to investing the court with jurisdiction of the subject matter of a suit in which the recordation of such a notice is required. A *lis pendens* . . . is the mode substituted by the legislature for the constructive notice to all the world of the pendency of such an action . . . ." (Emphasis added.)

21. Adams v. Kenson Supply Co., 137 So.2d 27 (Fla. App. 1962), recently decided by the Second District, followed the decision of *Trushin v. Brown*.

1. Mid-State Inv. Corp. v. O'Steen, 133 So.2d 455 (Fla. App. 1961). It would be more descriptive to refer to a contract for deed, or an agreement for deed, as an installment payment contract for the sale and purchase of real property. These instruments are generally unrecordable because they are not acknowledged, and because a provision usually found in this type contract prohibits recordation. See Agreement for Deed Form AA, in common use among Florida practitioners.

2. The plaintiffs' action was also one for conversion of the personalty located within the repossessed house.

3. FLA. STAT. § 697.01 (1961): "All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

"Provided, however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee, for value without notice, holding under the grantee."

4. Thomas v. Thomas, 96 So.2d 771 (Fla. 1957); Hull v. Burr, 58 Fla. 432, 50 So. 754 (1909); Bemort, Inc. v. Deerfield Beach Bank, 134 So.2d 28 (Fla. App. 1961).